



COMMITTEE RULING ON CARE S MOTION RE PUBLIC PARTICIPATION

SOUTHERN COMPANY S CONTRA COSTA POWER PROJECT,
APPLICATION FOR CERTIFICATION, DOCKET NO. 00-AFC-1

On December 6, 2000, Intervenor Californians for Renewable Energy, Inc. (CARE), filed its Motion for Hearing or Workshop on Public Participation Pursuant CEQA. The essence of the Motion is that the California Energy Commission s (CEC) regulatory review process under the Warren-Alquist Act is in irreconcilable conflict with the California Environmental Quality Act (CEQA) with regard to public participation. CARE asserted that the CEC process is a long way from providing CEQA equivalence in any sense of that requirement, particularly in regard to public participation. (Page 1)

CARE also claims that the Applicant s multiple, serial responses to the Energy Commission staff s data requests was analogous to the strongly disfavored chopping up [of] a proposed project into bite-size pieces which, individually considered, might be found to have no significance on the environment. (Page 2)

CARE complained about the timelines in the Commission s regulations and processes, which are used to meet statutory deadlines for the processing of power plant applications, contending that the deadlines rush public participation. (Page. 3)

Lastly, CARE asserts that it must have funding from the CEC to obtain its own legal and technical experts to be able to participate adequately on the complex and complicated matters in the CEC review process. (Page 9) CARE s Motion in this proceeding is essentially identical to CARE s August 30, 2000, Motion to Call Hearing on the Public Participation Process Pursuant to CEQA which was filed and denied in the Metcalf Energy Center proceeding (99-AFC-3).

This Committee responded to CARE s present Motion with an Order on December 13, 2000, providing CARE an opportunity to more fully develop the rationale for its Motion by responding to the following by December 27, 2000:

- § What are the specific CEQA rights which are not being afforded public participants in the Energy Commission s Contra Costa proceeding, now and for the duration of the case? List any references to CEQA, itself, in the Public Resources Code or the CEQA guidelines.
- § Does CARE have any legal references authorizing the Energy Commission to fund intervenor participation?

On December 24, 25 and 26, 2000, CARE responded with the following electronic filings, not only to the Contra Costa proceeding docket but also to the docket files in the Metcalf Energy Center, Potrero Unit 7 Project, and Blythe Energy Project proceedings, entitled:

- 1. 12-13-00 Order in Regards to CARE s Motion for a Hearing or Workshop on Public Participation Pursuant CEQA;
- 1. More on the 12-13-00 Order in Regards to CARE s Motion for a Hearing or Workshop on Public Participation Pursuant CEQA;
- 1. CARE s Data Request on the Motion for a Hearing or Workshop on Public Participation Pursuant CEQA;
- 1. Request for an Extension of the 12-27-00 Deadline for Compliance with Your 12-13-00 Order in Regards to CARE s Motion for a Hearing or Workshop on Public Participation Pursuant CEQA.

CARE s Request for an Extension asked for more time, at least to January 8, 2001, for filing responses to the Committee Order. The Committee granted the Request for Extension plus added two days more than was requested to January 10, 2001.

On December 27, 2000, the CEC Legal Office responded to CARE s December 22, 2000, Public Records Act request with copies of information about the CEC s Intervenor Funding Program that ended in 1995 and did not make payments to siting case intervenors.

On January 10, 2001, CARE filed its Request for another Extension of the Deadline for Compliance with Your 12-13-00 Order in Regards to CARE s Motion for a Hearing or Workshop on Public Participation Pursuant CEQA. As grounds for the extension, CARE generally asserted that it needs answers to its December Data Request to be able to respond to the Committee s December 13, 2000 Order.

Based upon the totality of circumstances surrounding the original CARE Motion, including the filings to multiple dockets and the multiple requests for extensions of time to respond to the Committee Order, the Committee has decided to address all of CARE s pending matters in this Order. Sufficient information is before the Committee to rule upon CARE s original Motion regarding the public participation opportunities in CEC proceedings. As explained below, the Committee does not believe that additional filings will provide any more information on the matters to be decided on CARE s Motion.

Extensions of Time

CARE asserts in its second request for an extension of time to file responses to the Committee Order that it needed answers to its December Data Request. This is not consistent with CARE s schedule in its own documents. CARE s Data Request stated that the responses to it were due on January 22, 2001 or at such later date as may be mutually agreed. . (Emphasis added.)

CARE s initial Request for an Extension of time stated, [w]e trust that, in some degree of fairness, you will grant our request and extend the present 12-27-00 deadline to at least 01-08-[01] (Page 2; Emphasis added.). Assuming that CARE had in mind its own prescribed deadline in the Data Request for answers by January 22, 2001, the Committee concludes that in initially requesting an extension of time to January 8, 2001 for responding to the Committee Order, CARE did not believe that the data responses were necessary for making such a response.

Responses to CARE s Data Request are not Necessary for Disposition of its Motion

Section 1716 of the Energy Commission s regulations provides for obtaining *information* by the use of data requests. Fundamentally, the discovery format of section 1716 allows a party, which does not have particular relevant information, to attempt to obtain it from a party that has that information.

While CARE s Data Request used some of the boilerplate language found in Staff s Data Requests, CARE s introduction to its questions reveals them to be something other than requests for *information*. CARE states:

In partial, ongoing response to your 12-13-00 orders, here are some of the questions that need to be asked at any hearing, workshop or other procedural device for the disclosure, submittal and analysis of relevant information by the public. (Emphasis added.)

The phraseology of CARE s introduction suggested that the questions which followed were likely better characterized as the ultimate issues to be discussed at a possible hearing instead of a request for specific factual information which CARE did not have. Examination of a sampling of CARE s questions largely supports such a conclusion:

1. Is it essential to compensate or reimburse intervenors or other members of the public for their public participation costs?
1. What is the role, the key functions, of public participation in the CEQA review process?
1. How do we cope with the fact that public participation s political function under CEQA is almost completely ineffectual in a CEC proceeding because the decision-makers are beyond the public s political reach?
1. Does CEQA require public participation to be both well informed (e.g., CEQA is a full disclosure statutory scheme) and meaningful or effective (i.e., has the public been given a full, fair and constitutionally adequate opportunity to influence the decision makers and otherwise participate in the overall environmental review and concurrent democratic decision making process)?

The Committee finds that CARE s Data Request is almost exclusively a restatement of the issues for which CARE s initial Motion asked for a hearing or workshop, does not ask for facts, and in some cases is argumentative. CARE does pose a question about the existence of an intervenor funding program under Senate Bill 283. However, information concerning SB 283 has already been provided CARE in response to its Public Records Act request. In that response, CARE was provided information that the Energy Commission does not and did not have an intervenor funding program which included participants in siting proceedings.

The Committee concludes, therefore, that by the nature of its own Data Request, CARE cannot obtain information, as information is contemplated in section 1716, by the questions it poses. The one factual question posed in CARE s Data Request has been answered by the response to its Public Records Act request.

Committee Ruling on the Merits of CARE s Initial Motion on Public Participation

CARE s multiple filings on this matter, plus the provisions of applicable law, provide ample basis for the Committee to render a ruling on CARE s Motion without a hearing or further submittals by any party.

Public Participation: CEQA versus CEC

CARE initially asserted that the CEC s certified regulatory program does not provide the opportunities for public participation that would be available under a typical CEQA proceeding. In footnote 2 of its Data Request, CARE appears to acknowledge that the CEC certified regulatory program has public participation requirements even stronger than CEQA s.

The Committee is confident that a side by side comparison of the CEC certified regulatory program and the typical CEQA process would disclose significantly greater opportunities for public participation in the CEC process. These additional public opportunities relate to an open analytical process, multiple public workshops and hearings, a series of public documents addressing environmental impacts, and a forum to contest disputed environmental issues.

The typical CEQA process often includes a public scoping meeting, followed by the agency or consultant preparing a Draft Environmental Impact Report (EIR) in a non-public setting. The public has its first opportunity to review the environmental analysis when the Draft EIR is released for a 30-day public comment period. Although not legally required, most agencies will conduct a public hearing on the Draft EIR. The public may comment orally at this hearing or submit written comments. Thereafter, the agency releases a Final EIR that updates its Draft EIR and responds to significant comments. The agency then holds the only required hearing to take action on the proposed project and certify the EIR to have been properly prepared and the process to have been properly conducted.

The CEC process requires a public hearing to begin the review only after the application has been evaluated to assure that it has sufficient information to begin the one-year regulatory process. Then, a public hearing is advertised and held in the community to inform the public of the proposal and likely environmental and health and safety issues. The Energy Commission staff then conducts numerous public workshops in the community soliciting input as it develops an independent evaluation of project impacts. That independent evaluation is then published in a Staff Assessment. The Staff conducts public workshops on its Assessment to receive public comments. Typically, Staff will publish an update called a Final Staff Assessment.

At this point, a Committee of two Commissioners conducts hearings to receive the applicant s position on its project, the Staff s position on the project, the position of intervenors, and information from other agencies or the interested public. These hearings allow any party to contest the position of any other party and present any relevant evidence.

The Committee then prepares a draft Proposed Decision that identifies the potential impacts of the project and needed mitigation as reflected in the presentations made at the hearings. The draft Proposed Decision is subject to a 30-day public comment period. If appropriate, a revision of the Proposed Decision is prepared and presented to the full five-member Energy Commission for consideration and possible adoption at a public hearing.

If the Energy Commission were to revert to the typical CEQA process, opportunities for public participation and public documentation would be sharply reduced. The Committee finds that a review of the CEC and CEQA processes does not support CARE s contention that CEQA public participation requirements are not available in the CEC process.

The Committee notes, as well, that the applicant s serial submittals of information as it is completed in response to Staff Data Requests is a positive element of the CEC s process. Multiple, serially filed data responses do not constitute a piece-mealing of the project. The CEC process is fortunate to have a means to obtain more information about the project to assure that its review is comprehensive and thorough. The fact that the applicants respond with that information in multiple separate filings as they are completed does not impair the review or confuse the process. Ultimately, all the information gathered by Staff and needed for its review will be disclosed in the Staff Assessment. The piece-mealing referred to by CARE is the breaking up of the project, itself, into multiple smaller projects to disguise the total environmental impacts. The CEC process does not allow the project to be broken up into such pieces. CARE s legal citation does not apply, even by analogy, to the applicant s multiple data responses completed and filed during the CEC discovery process.

Public Funding of Intervenor Participation

There is no provision in the law that allows the Commission to financially support intervenor participation in the power

plant siting proceedings. The only intervenor funding program which the Commission had in the past is now terminated. That program expressly did not include siting case intervenors.

The State of California supports the public interest in the review and potential licensing of power plants by funding civil service-authorized positions for technical experts in environmental, engineering, and public health and safety disciplines. The Commission staff represents the public of California, through its independent and professional review of the proposed project using standards for review embodied in the statutes and regulations of the federal government and the State of California.

The Staff's review of compliance with applicable federal, state, and local laws, ordinances, regulations and standards assures that the gubernatorially appointed Commissioners have the essential information about the project's compliance with environmental and public health and safety laws, engineering standards and best practices, and public policies embodied in such laws.

If, through what is commonly called a LORS review, a project is ultimately found to comply with all applicable laws of the United States, the State of California, and any local jurisdiction, then necessarily that project must comply not only with the substantive provisions of those laws but also any statutory policies embodying the public interest.

Any intervenor, including an individual citizen or a public group, may believe that it represents the public interest. However, for purposes of dispensing public monies, an intervenor interest is a private interest, whether held by either an individual or group. That private interest may or may not correspond to the public interest embodied in the laws adopted by the people's representatives.

The Committee acknowledges that the power plant siting proceedings are complex and sometimes difficult to comprehend or offer up a competent technical presentation. However, an intervenor does not require public funding to influence the evaluation of complex matters.

From the initial public Informational Hearing through a series of Staff workshops, any citizen as well as any formal intervenor can suggest or identify a topic for additional review. If the staff does not believe additional review is warranted, the citizen or intervenor can take the matter to the Committee. Upon a sufficient showing that additional review is needed for a thorough review of the project, the Committee can direct the applicant and/or staff to address that topic. None of this requires either out-of-pocket expense by an intervenor or public funding of intervenors' lawyers or their own technical experts.

For the reasons stated herein, the Committee denies CARE's Motion for a Hearing or Workshop on Public Participation Pursuant CEQA. CARE's request for an additional extension of time is denied.

Dated: Jan. 17, 2001

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

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